STATE OF MICHIGAN

COURT OF APPEALS

M.C.W., INC., d/b/a TODD'S RESTAURANT, MARCIA WELLS, and CHARLES WELLS,

Plaintiffs-Appellees-Cross-Appellants,

v

HAMILTON MUTUAL INSURANCE COMPANY, d/b/a EMC INSURANCE COMPANY, and MUTUAL INSURANCE CORPORATION,

Defendants-Appellants,

and

ARMS INSURANCE AGENCY, INC., and ANDY BLYSTRA,

Defendants-Cross-Appellees.

UNPUBLISHED
January 28, 2003

No. 233480
Muskegon Circuit Court
LC No. 00-039988-CK

Before: Owens, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendants Hamilton Mutual Insurance Company (Hamilton) and Mutual Insurance Corporation (Mutual) appeal as of right from a judgment entered in favor of plaintiffs following a jury trial in this case involving Hamilton's and Mutual's liability under contracts of insurance. Plaintiffs also raise issues on cross appeal related to judgment interest and liability of defendants ARMS Insurance Agency, Inc. (ARMS), and insurance agent Andy Blystra should we reverse on the issue of policy limits. We affirm.

I. OVERVIEW

This case arises out of a fire that destroyed plaintiffs' business, Todd's Restaurant, and their home, which was part of the same two-story structure housing the restaurant; the house was located on the second floor. Hamilton insured the restaurant and Mutual insured plaintiffs' home and contents. Plaintiffs obtained their insurance policies through ARMS and specifically agent Andy Blystra. Defendants Hamilton and Mutual denied insurance coverage on the basis

that the fire was arson committed by either plaintiffs or someone acting at plaintiffs' direction. The jury disagreed and found that no arson took place, and defendants do not directly challenge that finding on appeal. However, defendants Hamilton and Mutual argue that a mistrial should have been granted, where it was implicitly injected at trial that no criminal charges were pressed against plaintiffs, and where the trial court had granted defendants' motion in limine precluding introduction of the lack of any criminal charges.

The main focus on appeal is claimed error arising out of the trial court's failure to grant motions for summary disposition, directed verdict, judgment notwithstanding the verdict [JNOV], and new trial regarding the extent of the insurance coverage on the restaurant. Plaintiffs argued that the policy limit had been extended to $422,359, and Hamilton asserted that it remained the original policy limit of $253,094. The trial court found that an issue of fact existed on the matter, and the jury agreed with plaintiffs that the policy had been increased to $422,359. Hamilton and Mutual also argue that the trial court erred in failing to dismiss the case before trial based on plaintiffs' failure to cooperate with the insurers as required by the insurance policies and based on plaintiffs' false swearing during the examinations under oath [EUO]. The trial court ruled that an issue of fact existed concerning cooperation and false swearing under the policies, and the jury found that plaintiffs complied with the conditions precedent set forth in the insurance policies and did not engage in false swearing.

Defendants ARMS and Blystra were brought into the suit because of plaintiffs' alternative argument that if Hamilton was not obligated to the extent of $422,359, it was agent Blystra's negligence that caused plaintiffs not to be insured to that extent because Mr. Wells agreed to an increase in the coverage prior to the fire. The jury did not have to reach the issue in light of its finding that plaintiffs were insured up to $422,359. Plaintiffs' cross appeal concerns ARMS' and Blystra's liability at the trial level should we reverse the verdict as to the amount of coverage. Plaintiffs also raise an issue regarding the judgment interest rate.

II. FAILURE TO COOPERATE AND FALSE SWEARING

Trial court did not commit error in failing to grant defendants' motion for summary disposition with regard to the issue of noncompliance with conditions precedent to the insurance contract and false swearing. This Court reviews rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999).[1]

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[1] MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Our Supreme Court has ruled that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id*. Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v*

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Defendants rely on provisions contained in the insurance policies requiring cooperation and compliance before payment on the policies and prior to suit. "A 'condition precedent' is a fact or event that the parties intend must take place before there is right to performance." *Yeo v State Farm Ins Co*, 219 Mich App 254, 257; 555 NW2d 893 (1996). "Courts are not inclined to construe stipulations of a contract as conditions precedent unless compelled by the language of the contract." *Id.* An insurance policy condition requiring an examination under oath before an insured has the right to bring an action is a valid condition precedent and as a general rule enforceable, and one who without cause refuses to submit to such an examination should be precluded from maintaining an action on the policy. *Id.*

In *Thomson v State Farm Ins Co*, 232 Mich App 38, 55-56; 592 NW2d 82 (1998), this Court, addressing noncompliance with an EUO requirement and the issue of dismissal of civil actions where the requirement is not satisfied, held:

> Here, we conclude that *Yeo* reached the correct result and apply it to the circumstances of this case. In so doing, we hold that if the noncompliance is wilful, the dismissal must be with prejudice; if the noncompliance is not wilful, the dismissal must be without prejudice. We further hold that henceforth, the insured must show that there was not a deliberate effort to withhold material information (as opposed to a knowing failure to submit to an EUO) or a pattern of noncooperation with the insurer.

In *Gibson v Group Ins Co of Michigan*, 142 Mich App 271, 275; 369 NW2d 484 (1985), this Court stated that Michigan follows the substantial performance of contract rule in connection with conditions precedent in an insurance contract. A contract is substantially performed when all the essentials necessary to the full accomplishment of the purposes for which the thing contracted has been performed with such approximation that a party obtains substantially what is called for by the contract. *Id.* "In addition, authority exists for the proposition that insurance contracts are not void due to misrepresentations or false statements where the insurer was not prejudiced." *Id.* at 276. This can involve factual questions for the jury to determine. *Id.*

Here, at a minimum, there were questions of fact regarding whether plaintiffs substantially complied with their obligations under the policies. Plaintiffs in fact submitted to their respective EUOs and answered the questions posed to them, and they produced numerous documents. Defendants argue that plaintiffs were asked at length about the circumstances surrounding the fire and origin yet they failed to disclose information about a fire investigation expert previously hired by plaintiffs. Additionally, plaintiffs failed to produce audio tapes and fire scene photographs. However, defendants fail to cite any EUO questions or document requests that specifically touched on investigators plaintiffs may have hired or about photographs of the fire scene. Regarding taped conversations Mr. Wells had with Blystra and others, Wells

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Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996). Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363.

stated at the EUO that he would turn over the tapes if he could still find them. It is true that at his subsequent deposition, Mr. Wells told defense counsel that the hiring of the fire investigator was none of their business, and he acknowledged that the EUO required him to provide all documents related to the claim, which would include tape recordings and reports from a cause and origin investigation. However, Mr. Wells also testified as follows at his deposition:

> *Q*. You didn't produce the tape-recordings that you made of conversations between yourself and other people.
>
> *A*. No. They weren't related to the fire, I guess, is what I'm saying.

He further testified:

> *Q*. Okay. Did you purposely not tell insurance carrier representatives about the fact that you had paid someone to come in and conduct an origin and cause investigation of the fire?
>
> *A*. No. I didn't purposely not tell them.

It cannot be said as a matter of law that plaintiffs wilfully and deliberately withheld material information at the time of the EUOs. Moreover, it cannot be said as a matter of law that the failure to produce the information and materials constituted a failure to substantially comply with the conditions precedent. Further, it cannot be said as a matter of law that plaintiffs' actions constituted a pattern of non-cooperation. The issues were properly presented to the jury.

Additionally, there was no prejudice to defendants' case where they subsequently obtained the information and materials at issue. Defendants argue at great length that if the information and materials were timely provided, the case "may" have taken various directions other than how the case eventually played out; however, once having the information, defendants fail to identify an actual course of action that would have been any different. There was no error requiring reversal.

III. MOTION FOR MISTRIAL

The trial court did not abuse its discretion in denying defendants' motion for mistrial. Whether to grant or deny a motion for mistrial in a civil action is within the discretion of the trial court and will not be reversed absent an abuse of discretion resulting in a miscarriage of justice. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999). A new trial may be granted if the trial court cannot say that the result was not affected. *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 290; 602 NW2d 854 (1999).

This Court has adopted the position taken by all other courts outside Michigan that evidence of acquittal or lack of prosecution is not admissible in an insured's suit against the insurer. *Cook v Auto Club Ins Ass'n (On Remand)*, 217 Mich App 414, 417-418; 552 NW2d 661 (1996). Defendants argue that counsel for plaintiffs, in violation of the court's pretrial order, asked Mr. Wells on redirect whether he and his son had ever been arrested. However, it is important to review the statements in context. The prior questioning of Mr. Wells on cross-

examination by defense counsel essentially opened the door on the issue, while leaving the appearance that Mr. Wells had been arrested.

On redirect, plaintiffs' counsel asked Mr. Wells: "The rumors about you and your son having been arrested, let me first of all clear up. Did you or your son ever get arrested – [?]" Defense counsel objected before any response, and the jury was excused. The trial court denied the motion for mistrial because it opined that the situation did not jeopardize defendants' right to a fair trial, and the court issued a curative instruction on the matter.

We find that defense counsel, even if done unintentionally, opened the door on the issue and necessarily lead to plaintiffs' counsel's question to Mr. Wells about any arrest. Defense counsel's questioning of Mr. Wells regarding rumors of arson by Wells and his son being heard over a police band radio or scanner, without any more, could reasonably have left the jury with the impression that Wells had been subject to a police investigation and arrest. See *Cook, supra* at 419, n 1 (Evidence of the lack of a criminal prosecution may be admissible to counter evidence of police investigation that suggested criminal charges had been instituted.).

Taking into consideration the nature of defense counsel's questioning, the lack of any specific response one way or the other to the question from plaintiffs' counsel about any arrest, and the trial court's curative instruction,[2] it cannot be said that there was an abuse of discretion or a miscarriage of justice.

IV. EXTENT OF POLICY COVERAGE

The trial court did not commit error in failing to grant defendants' motions for summary disposition, directed verdict, JNOV, and new trial because issues of fact existed requiring resolution by the jury, and because there was competent evidence to support the jury's verdict.[3]

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[2] A trial court's decision to grant a mistrial is only appropriate where a curative instruction would not cure the prejudice. *Persichini, supra* at 636-637. Jurors are presumed to understand and follow their instructions. *Bordeaux v The Celotex Corp,* 203 Mich App 158, 164 ; 511 NW2d 899 (1993).

[3] As with a motion for summary disposition, motions for directed verdict and JNOV are reviewed de novo by this Court. *Cacevic v Simplimatic Engineering Co (On Remand),* 248 Mich App 670, 679; 645 NW2d 287 (2001); *Morinelli v Provident Life & Accident Ins Co,* 242 Mich App 255, 260; 617 NW2d 777 (2000). In reviewing the trial court's decision on a motion for directed verdict, this Court views the evidence presented up to the time of the motion in a light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Cacevic, supra* at 679. A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ. *Id.* at 679-680. If reasonable jurors could reach conclusions different than this Court, then this Court's judgment should not be substituted for the judgment of the jury. *Id.* at 680. These same standards are applicable to a motion for JNOV. See *Morinelli, supra* at 260-261.

The trial court's denial of a motion for new trial is reviewed for an abuse of discretion.
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In relation to the motions for summary disposition, directed verdict, and JNOV, the question for us is whether there was a question of fact with regard to the existence of a legally enforceable agreement to increase insurance coverage to $422,359 when viewing the evidence in a light most favorable to plaintiffs. We answer affirmatively regardless of whether Blystra was solely plaintiffs' agent or a dual agent, and it was proper for the jury to determine the matter because of factual issues. Viewing the evidence in a light most favorable to plaintiffs, the following can be said:

1. Blystra sought to have plaintiffs increase their insurance coverage to $422,359;

2. The January 1999 correspondence from Hamilton sought to have plaintiffs adjust their insurance coverage upward;

3. Mr. Wells agreed to increase the insurance to $422,359;

4. Blystra agreed to the have the insurance coverage increased to $422,359;

5. Blystra contacted Hamilton's underwriter, Robert Lutton, and told Lutton that Mr. Wells agreed to an increase in coverage to $422,359 regardless of the premium cost;

6. Lutton agreed to the increase and would get back to Blystra regarding the cost of even higher coverage;

7. There was no written document reflecting an increase in coverage to $422,359; and

8. There was a history between Blystra and Lutton reaching agreements without a writing, and no written document was necessary in this case.

With these favorable facts in mind, we shall first explore the matter of agency. An agency relationship may arise based on a manifestation by the principal that the agent may act on behalf of the principal. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). "'Ordinarily, an independent insurance agent or broker is an agent of the insured, not the insurer.'" *Mate v Wolverine Mutual Ins Co*, 233 Mich App 14, 20; 592 NW2d 379 (1998), quoting *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995); accord *Mayer v Auto-Owners Ins Co*, 127 Mich App 23, 26; 338 NW2d 407 (1983). Dual agency occurs when two persons or entities share the services of an individual for a single act. *Vargo v Sauer*, 457 Mich 49, 69; 576 NW2d 656 (1998).

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Id. at 261. A new trial may be granted if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990), aff'd 438 Mich 347; 475 NW2d 30 (1991). This Court gives substantial deference to the trial court's determination that a verdict is not against the great weight of the evidence. *Morinelli, supra* at 261. The jury's verdict should not be set aside if there is competent evidence in support of the verdict; the trial court cannot substitute its judgment for that of the jury. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Here, there was evidence that Blystra was not only acting as plaintiffs' agent, but as an agent for Hamilton. When Hamilton sent the November and January letters to Blystra suggesting that there should be an upward adjustment in insurance coverage, Blystra promptly communicated to Mr. Wells that he should increase the coverage. ARMS and Hamilton had actual written agreements governing ARMS' actions in relation to insureds and referencing ARMS' ability to accept liability on Hamilton's behalf. These examples could constitute a manifestation by Hamilton that ARMS/Blystra had authority to act on behalf of Hamilton. Even defense counsel at trial indicated that in some situations Blystra could bind Hamilton. Minimally, there was an issue of fact regarding whether Blystra was a dual agent.

However, even if Blystra was also Hamilton's agent, there is a dispute as to whether Blystra could bind Hamilton to the extent of the dollar amounts and the type of building involved and without a writing. The testimony and documents concerning any writing requirement were conflicting at best. Lutton first stated that it was an unwritten rule that things needed to be in writing, and Blystra testified that he and Lutton often completed deals orally over the phone. One document provided that Hamilton must receive written notice within 3 business days after the coverage was first bound; however, this language suggests that a "contract" can be formed verbally with written notice simply confirming the completed deal, and Blystra so testified, along with explaining that written confirmation was not completed here because of the possibility that the coverage could be increased even higher. Another document, the Hamilton-ARMS agency/company agreement, indicated that ARMS could either forward written documents to Hamilton within three business days, "or otherwise notify the company of all liability accepted" within three days. This language suggests that a "written" document is not necessarily required. Based on the conflicting documents and testimony, whether a writing was required to form a contract was properly considered an issue of fact for the jury. Regarding whether Blystra as an agent of Hamilton had authority to bind Hamilton for more than $250,000 or in any amount at all because a restaurant was involved, Blystra testified that the "increase" was less than $250,000 and that was all that mattered, that this rule was not applicable because it was not a "new policy", and that it was not applicable because Hamilton recommended an increase in coverage in the first place. Once again, issues of fact abound regarding whether Blystra had authority to bind Hamilton.

We now explore whether an enforceable contract was formed between plaintiffs and Hamilton in the context of both Blystra acting as Hamilton's agent and Blystra not acting as Hamilton's agent.

The essential elements of an insurance contract on which the parties' minds must meet and agree are: (1) the subject matter to which the policy is to attach; (2) the risk injured against; (3) the duration of the risk; (4) the amount of indemnity; and (5) the premium to be paid. *Martin v Lincoln Mutual Casualty Co,* 285 Mich 646, 649; 281 NW 390 (1938).

An enforceable contract is not created unless there is an offer, an acceptance, and mutual assent on all essential terms. *Eerdmans v Maki,* 226 Mich App 360, 364; 573 NW2d 329 (1997). An offer is the manifestation of willingness to enter into a bargain so made as to justify another person in understanding that his or her assent to that bargain is invited and will conclude it. *Id.* The acceptance must be unambiguous and in strict conformance with the offer or else no contract is formed. *Id.* Acceptance in an insurance contract context may be implied from the insurer's conduct if the offer does not require a specific form of acceptance. *St Paul Fire & Marine Ins*

Co v Ingall, 228 Mich App 101, 106; 577 NW2d 188 (1998). It is appropriate for a court to look at the course of conduct between parties in order to interpret the intentions of the parties with respect to the terms of an agreement. *The Cooke Contracting Co v Dep't of State Highways*, 52 Mich App 402, 409-410; 217 NW2d 435 (1974). Parties may enter into an oral contract, the terms of which may be demonstrated by a course of dealing and performance. *H J Tucker & Associates, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 567; 595 NW2d 176 (1999). A valid contract requires a meeting of minds on all essential terms, which is judged by an objective standard that looks to the express words of the parties and their visible acts, not the subjective state of mind. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992).

Here, if Blystra is considered an agent of Hamilton with authority to enter into a binding contract to increase coverage to $422,359 without a writing, there was clearly an unambiguous offer and acceptance with the acceptance strictly conforming to the strictures of the offer. There was also a meeting of minds. Blystra repeatedly offered and requested to increase plaintiffs' coverage on the restaurant to either $422,359 or $528,609, and Mr. Wells subsequently accepted the offer by agreeing to increase the coverage to $422,359. It is beyond legitimate argument that at minimum there was an issue of fact on the matter.

If Blystra was acting solely as an agent for plaintiffs, the issue of contract formation becomes more tenuous; however, minimally an issue of fact still remained. The correspondence from Hamilton could conceivably be considered an offer to increase coverage, where there was language that plaintiffs' insurance coverage should be adjusted upward. The acceptance of the offer would be Mr. Wells' agreement to increase the coverage to $422,359 that was communicated to Lutton when viewing the evidence in a light most favorable to plaintiffs. Even if the document could not be considered an offer, Mr. Wells' communication to Lutton, through Blystra, agreeing to increase coverage to $422,359 could constitute an offer to increase coverage. Lutton's failure to reject the increase and acknowledgment of the increase, as testified to by Blystra, could be considered an implied acceptance, especially in light of the course of dealing and conduct between Lutton and Blystra over a significant period of time. There were issues of fact precluding summary disposition.

Concerning the motion for new trial, there was no abuse of discretion by the trial court in denying the motion because there were sufficient facts, cited above, establishing an enforceable insurance contract in the amount of $422,359.

V. JUDGMENT INTEREST

On cross appeal, plaintiffs assert that the interest on the judgment should be twelve (12%) percent. Plaintiffs themselves submitted the proposed judgment with interest rates of 6.7563% for March 10 through July 1, 2000, and 7.473% for July 2 through December 6, 2000, pursuant to MCL 600.6013(6)[interest calculated at "6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes . . . ."]. The record does not reveal any motion filed by plaintiffs seeking relief from judgment under MCR 2.612 to correct any alleged error in the interest rate. Accordingly, plaintiffs have waived this issue.

VI. CONCLUSION

We affirm the judgment as it relates to arguments presented by Hamilton and Mutual because genuine issues of material fact existed with regards to compliance with conditions precedent found in the insurance policies and the extent of policy liability limits. Moreover, there was no abuse of discretion concerning the denial of the motion for mistrial in light of the circumstances surrounding how the arrest issue arose at trial.

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Mark J. Cavanagh